limited services in the industrial park in which it is located.[186] Specifically, it provides international 800 service for a telemarketing service center for data processing located in an international Free Trade Zone. In summary, we find no basis at this time to regulate AT&T as a dominant carrier on any U.S. international route where AT&T is affiliated with a foreign carrier in the destination market.

C. Forbearance

94. As noted above, the most recent data available to the Commission reveals that there are four markets in which AT&T is the sole facilities-based provider of IMTS.[187] These markets are: Madagascar, Western Sahara, Chagos Archipelago, and Wallis and Futuna. Based on the record developed in this proceeding, we believe that it is appropriate to forbear from imposing dominant carrier regulation for IMTS to these countries.

95. Under new Section 10 of the Communications Act of 1934, as added by the *1996 Act*, the Commission must forbear from imposing any regulation "in any or some . . . geographic markets" if we determine that: (1) enforcement of such regulation is not necessary to ensure that rates are just and reasonable or not unjustly or unreasonably discriminatory; (2) enforcement of such regulation is not necessary for the protection of consumers; and (3) forbearance from applying such provision is consistent with the public interest.[188] Moreover, as part of the determination, the Commission must also consider whether forbearance from enforcing regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[189]

96. As to the first two prongs, as mentioned above in Section III. B. 1., historical trends suggest the strong possibility that more than one U.S. facilities-based carrier will soon enter these four markets. As discussed throughout, such potential competition can ensure that prices continue to remain just and reasonable, and we believe that it will do so. Indeed, as also noted above, there is no evidence in the record to suggest that there are substantial barriers to entry which impede potential competitors from entering immediately.[190] We also note that the tariffed rates to these four locations are not out of line with tariffed rates to international locations. There are other countries with rates that are higher than or similar to

[186] AT&T Affiliation Letter at 1.

[187] *See 1994 Section 43.61 International Data*, Table E.1, at 2-5.

[188] 47 U.S.C. § 160(a).

[189] 47 U.S.C. § 160(b).

[190] *See supra* Sections III. A. and B.

those for these countries.[191] Faced with such evidence, therefore, we conclude that dominant carrier regulation to these four countries is not required to ensure that rates are just and reasonable or to otherwise protect consumers.

97. As to the last prong, this Commission has consistently held that, when the economic costs of regulation exceed the public interest benefits, the Commission should reconsider the validity of continuing to impose such regulation on the market.[192] The Commission's most recent data reveal that the actual amount of U.S. billed revenues to each county is *de minimis* compared to the overall number of total U.S. billed revenues.[193] Total U.S. billed minutes for each of these four routes also account for a *de minimis* share of total U.S. billed minutes.[194] Collectively, the minutes to these countries account for 0.0025 percent of total U.S. outgoing minutes. With such small amounts, we believe that we cannot justify the economic costs of *dominant* carrier regulation -- *e.g.*, inhibiting innovation in prices or services, imposition of substantial compliance on parties and administrative costs on the Commission[195] -- for routes with such *de minimis* traffic.[196] In such circumstances, such regulation can actually impede, rather than promote competitive market conditions, including deterring competition among providers of telecommunications services. Accordingly, we will forbear from applying dominant carrier regulation to these four countries.

IV. Conclusion

98. In light of the above, we conclude that AT&T has demonstrated that it lacks market power in international telecommunications markets and, accordingly, we grant AT&T's motion for reclassification as a non-dominant carrier for both IMTS and multi-purpose earth station services. AT&T remains bound, however, by its status as a common carrier and by its voluntary commitments in this proceeding, and the Commission remains committed to enforcing its rules through our investigation and complaint procedures.

99. Our declaration here that AT&T is non-dominant in the provision of international services on most U.S. international routes, and our forbearance from imposing

[191] *See* AT&T Tariff No. 27, §§ 24.1.2.C.1 and 24.1.2.C.6(a).

[192] *See AT&T Reclassification Order* at ¶ 32 and n.90.

[193] Actual billed revenues to each country are: Madagascar ($807,490), Chagos Archipelago ($145,234), Wallis & Futuna ($4,851) and Western Sahara ($17.00). *See FCC 1994 Section 43.61 International Communications Data* (1996), Table E-1.

[194] *See supra* Section III. B. 1.

[195] *See AT&T Reclassification Order* at ¶ 33.

[196] *See e.g.*, AT&T Reply at 6 n.13 ("profitability is a key issue for carriers in deciding where (and how) to serve")

dominant carrier requirements on remaining routes, will have several effects. First, AT&T will be freed from price cap regulation for its residential IMTS. AT&T will not have to submit cost support data now required for above-cap filings, or the additional information that it is now required to submit with tariff filings for new services. Second, AT&T will be allowed to file tariffs for all of its international services on one days' notice, without economic or cost support, in the same form as filed by other non-dominant carriers, and the tariffs will be presumed lawful.[197] Third, the Section 214 requirements imposed on AT&T as a dominant carrier will be eliminated and AT&T will be subject to the Section 214 requirements of non-dominant U.S. international carriers.

100. As a non-dominant or forborne carrier, AT&T will still be subject to regulation under Title II of the Act. Specifically, Title II requires carriers to offer international services under rates, terms and conditions that are just, reasonable and not unduly discriminatory (Sections 201 and 202), and Title II carriers are subject to the Commission's complaint process (Sections 206-209). Title II carriers also are required to file tariffs pursuant to our streamlined tariffing procedures (Sections 203 and 205).

101. We recognize that the international services market is not fully competitive and that prices for IMTS are high. We believe, however, that the current imperfectly competitive market is not the result of AT&T's market position but, rather, stems from structural problems in the international services market. The Commission will continue to consider issues related to these structural problems in both pending and future proceedings.[198]

102. The Commission delegates the authority for making the necessary adjustments to implement this Order to the International Bureau, working in conjunction with the Common Carrier Bureau. This Order will be effective upon its release.

V. Ordering Clauses

102. Accordingly, it is HEREBY ORDERED that AT&T's motion for reclassification as a non-dominant carrier in U.S. international telecommunications markets, including international message telephone service and multi-purpose earth station services, under Part 61 of the Commission's rules is hereby GRANTED.

104. IT IS FURTHER ORDERED that AT&T shall comply with the commitments in its May 2, 1996 *ex parte* letter from R. Gerard Salemme, Vice President -- Government Affairs, to William F. Caton, Acting Secretary, Federal Communications Commission, and which are summarized in this order in Appendix A.

[197] *Streamlining Order* at ¶ 77.

[198] *See, e.g., Foreign Carrier Entry Pending Reconsideration, Accounting Rate Policy Statement*; Regulation of International Accounting Rates, CC Docket No. 90-337, (Phase II), *Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040 (1992).

105. IT IS FURTHER ORDERED that this Order will become effective upon its release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

STATEMENT OF VOLUNTARY COMMITMENTS
IN MAY 2, 1996 AT&T *EX PARTE* LETTER

AT&T, in its May 2, 1996 *ex parte* letter, states that it commits to the following provisions:

1. For a period ending May 9, 1999, AT&T will maintain its annual average revenue per minute [ARPM] for international residential calls (equivalent to basket 1 price capped services) at or below the 1995 ARPM level including for the partial year of 1999. Such a determination will be made using the total revenues and total minutes generated by residential customers using international switched services. AT&T will report its APRM for 1995 and ongoing for international residential switched services confidentially to the Commission on an annual calendar year basis through 1998 and for the partial year of 1999 detailing the total revenue and total minutes generated. The purpose of such a report will be for monitoring this commitment. Moreover, AT&T is willing to provide a letter from its external auditors verifying the ARPM calculation.

   In the event of a significant change that substantially raises AT&T's international per minute costs, AT&T may make rate changes that increase the international residential switched services annual ARPM above the 1995 level on not less than five (5) business days notice to the Commission prior to implementing such a rate. The notice to the Commission shall be for the purpose of highlighting this commitment.

2. For a period ending December 31, 1996, AT&T will maintain rates in effect on April 1, 1996 for customers enrolled in AT&T's True Country offer (excluding China). Thereafter, AT&T may raise rates for True Country; however, if the rates for this offer increase by more than 5% (excluding China), AT&T commits to have an offer in place with rates for a customer's selected country (excluding China) discounted 15% compared to the same basic international long distance price schedule as in the current True Country offer. This 15% discounted offer will be available until May 9, 1999.

3. a. AT&T will provide the Commission a quarterly report on its provisioning of circuits to the cable membership as a whole and separately for AT&T's circuits for those cable systems in which AT&T is the cable maintenance authority. AT&T will use a quarterly forecast of circuit activation provided by the US cable owners to plan demand and improve circuit activation intervals. AT&T will use these forecasts to establish standard intervals that are intended to reduce the current provisioning intervals to 15 days for intra-office and 25 days

for inter-office circuit activation effective July 1, 1996. AT&T further agrees to improve its process and to identify the differences between interconnection services and cable station maintenance authority responsibilities and act in good faith to reduce provisioning intervals to 7 days for intra-office and 20 days for inter-office circuit activation no later than October 1, 1996. AT&T will provide this quarterly report for a period of one year ending June 1997, and will continue to report its performance to the FCC and its cable partners until the targeted intervals are achieved and maintained for two consecutive quarterly reports, unless AT&T's inability to achieve the intervals is caused by material inaccuracies in the forecast from other carriers or the actions of a foreign administration.

   b. As to consortium cable systems that land in the US in which AT&T is an owner, AT&T will, for a period ending May 9, 1999, subject to the terms of the applicable C&MA, act as a broker for US carriers that have been unable to become owners of international cables to purchase and transfer on an IRU basis whole-MIU capacity desired by those carriers from the common reserve of the cable system.

4. AT&T will provide the dry-side portion of the DACs (that equipment associated with connections to the domestic US carriers' networks) on an IRU basis retroactive to the start of service for TAT-12/13 and TPC-5 at the option of each US-end owner. The wet-side portion of the DACs (that equipment associated with connections to the submerged cable system) remains the property of the consortium cable owners.

5. AT&T will seek competitive bids for the provision of backhaul facilities used for submarine cable restoration. Bids will be sought beginning one year before the expiration of any existing or pending restoration agreement. AT&T's obligation as cable station operator to make space available to successful bidders is subject to applicable government laws and regulations.

6. AT&T will form and manage a Western Owners group to foster on-going discussions concerning the quality and performance of AT&T's operations at the cable landing stations and involvement in wet plant (submerged cable and associated equipment) maintenance and repair. AT&T will notify the Commission of the schedule for the semi-annual meetings of this group. Any owner may propose a meeting of this group to its chairperson.

7. AT&T will use its best efforts to achieve a TAT-12 restoration arrangement for existing capacity. AT&T and PAT have agreed to use their best efforts to resolve pricing and equipment issues by June 7, 1996.

8. AT&T with the Eastern and Western cable owners will establish a committee to discuss the long term consortium cable planning configurations for the Pacific Ocean, Americas, and Atlantic Ocean Regions.

9. AT&T commits to conform to the disclosure requirements of Section 64.1001, in accordance with the following interpretation:

a. When an AT&T time-bounded accounting rate has expired without a new agreement having been approved by the Commission, AT&T will notify the Commission and the other facilities-based carriers that correspond with the foreign carrier of the expiration within thirty days after such expiration; and

b. AT&T will notify the Commission and the other facilities-based carriers that correspond with the foreign carrier of any payment on account (including payment a the expired rate level) made to the foreign carrier after expiration of a time-bounded accounting rate and before a new rate has been bilaterally agreed and approved by the Commission, within thirty days after payment.

c. Absent industry-wide compliance and/or enforcement by the Commission of US carrier disclosure obligations consistent with the interpretation of Section 64.1001 set forth above, AT&T's commitment will expire on December 31, 1996.

10. For a period ending May 9, 1999, AT&T commits to use its best efforts to establish one minute accounting rate arrangements. Where, despite AT&T's best efforts to do so, AT&T only can achieve a growth based arrangement, AT&T commits to use its best efforts to establish the growth-based thresholds on aggregate industry traffic volumes. Where, notwithstanding AT&T's best efforts, AT&T cannot obtain such an agreement and only a growth-based arrangement based on AT&T's traffic volumes is achievable, AT&T commits that, at the request of the Commission, it will provide traffic information for each settlement period sufficient to determine AT&T's average accounting rate (*i.e.*, equivalent one-minute accounting rate) under the growth-based arrangement. For all pending waiver requests of AT&T involving growth-based arrangements or with respect to any other growth-based arrangements the Commission may identify, AT&T further commits to submit traffic information for each period sufficient to determine AT&T's average accounting rate.

11. AT&T will file a circuit status report for calendar year 1997 with respect to AT&T circuits between the US and its WorldPartners' members on their home country route.

12. AT&T will file a confidential report, covering the twelve-month period after the issuance of a Commission order on AT&T's Motion for Reclassification, of

the number of AT&T-led WorldSource services bids with respect to services provided with equity members of WorldPartners. With respect to that twelve-month period, AT&T will also assist the Commission in the gathering of public information about competing bids in the international market for global seamless services.

13. For a period ending May 9, 1997, AT&T will provide the Commission with the name of the purchaser, facility, capacity and price for IRU conveyances to other US carriers not affiliated with AT&T within thirty days after the conveyance.

	1991		1994	
Country	US Billed Revenue	AT&T Market Share	US Billed Revenue	AT&T Market Share
Andorra	$409,740	99.7%	$121,064	89.5%
Gibraltar	$394,837	99.9%	$830,035	74.3%
Liechtenstein	$417,459	99.9%	$469,815	99.9%
Malta	$1,883,355	99.9%	$2,875,870	89.4%
Angola	$640,234	92.9%	$1,612,842	55.5%
Benin	$517,740	99.9%	$1,148,213	63.5%
Botswana	$1,167,938	90.0%	$1,572,054	63.8%
Burkina	$835,777	100.0%	$1,151,151	66.5%
Burundi	$860,915	100.0%	$1,728,145	80.7%
Cameroon	$3,633,729	93.6%	$4,928,688	61.1%
Central African Republic	$392,126	99.5%	$830,700	57.0%
Chad	$411,862	100.0%	$719,946	57.5%
Comoros	$36,483	96.6%	$145,534	85.1%
Cote d'Ivoire	$7,495,819	100.0%	$12,320,591	59.8%
Djibouti	$1,006,898	98.4%	$892,954	50.5%
Equatorial Guinea	$105,773	100.0%	$188,509	94.2%
Ethiopia	$15,548,529	98.8%	$18,436,811	84.7%
Gabon	$1,336,482	100.0%	$1,698,939	61.0%
Guinea	$1,237,951	100.0%	$2,697,876	84.2%
Guinea-Bissau	$303,358	94.3%	$813,567	59.8%
Lesotho	$442,428	99.9%	$522,242	80.7%
Liberia	$3,248,151	94.2%	$6,052,235	79.9%
Libya	$985,458	99.9%	$1,358,569	97.9%
Madagascar	$578,026	99.7%	$807,490	100.0%
Mali	$2,913,882	99.9%	$4,454,956	54.8%
Mauritius	$904,861	99.7%	$1,576,345	65.5%
Morocco	$8,870,951	99.9%	$14,353,226	63.0%
Mozambique	$723,842	96.3%	$1,987,521	48.9%
Namibia	$782,394	99.9%	$1,293,673	99.7%
Niger	$1,018,416	97.9%	$998,282	68.1%
Rwanda	$644,049	99.7%	$500,797	99.7%
Saint Helena	$89,532	99.7%	$205,215	98.3%
Sao Tome and Principe	$119,794	93.9%	$40,809,904	76.9%
Sierra Leone	$4,964,007	98.8%	$8,584,495	71.0%
Somalia	$339	100.0%	$1,539	99.4%
Sudan	$3,196,487	100.0%	$2,947,154	57.4%
Swaziland	$581,111	99.9%	$732,493	87.4%
Togo	$1,333,247	100.0%	$2,006,543	93.7%
Uganda	$1,385,890	100.0%	$3,537,251	56.6%
Western Sahara	$24	100.0%	$17	100.0%
Zaire	$818,261	99.9%	$1,507,726	6.7%
Zimbabwe	$3,413,843	99.8%	$5,353,382	69.9%
Lebanon	$8,646,465	98.5%	$37,503,447	53.4%
Anguilla	$2,011,375	91.3%	$19,376,456	97.3%
Cuba	$21,210,237	99.9%	$26,823,915	91.2%
Grenada	$7,579,497	90.2%	$9,510,773	78.7%

Jamaica	$110,130,087	93.5%	$176,394,111	78.5%
Montserrat	$1,900,887	92.0%	$2,827,637	76.0%
Saint Kitts and Nevis	$5,523,060	91.4%	$7,814,723	77.1%
Turks and Caicos Islands	$2,585,504	93.2%	$4,179,917	80.1%
US Virgin Islands	$966,344	95.6%	$18,643,100	95.5%
Belize	$14,053,645	94.5%	$16,424,422	78.5%
Nicaragua	$29,578,758	98.0%	$45,553,404	98.0%
Saint Pierre and Miquelon	$24,450	92.4%	$32,899	62.2%
French Guiana	$523,600	90.9%	$619,622	65.9%
Guyana	$18,863,267	100.0%	$50,202,176	86.9%
Suriname	$3,636,054	100.0%	$15,195,651	80.0%
Afghanistan	$251,945	99.9%	$6,067	75.4%
Bhutan	$97,381	100.0%	$174,126	52.9%
Brunei	$621,238	98.8%	$1,539,482	48.3%
Burma	$1,609,594	100.0%	$4,076,051	54.7%
Chagos Archelago	$0		$145,234	100.0%
Laos	$641,975	98.3%	$2,347,942	58.8%
Maldives	$287,279	99.8%	$289,974	62.9%
Nepal	$2,851,661	99.1%	$4,709,229	62.4%
Cook Islands	$298,042	91.4%	$639,184	67.2%
Wallis and Futuna	$396	100.0%	$4,851	100.0%
Midway Atoll	$46,577	98.6%	$73,828	89.9%
Wake Island	$21,826	100.0%	$1,292	99.4%
Albania	$798,581	91.4%	$2,577,065	65.4%
Bulgaria	$4,138,676	99.6%	$9,039,447	55.2%
Poland	$73,717,543	90.2%	$98,851,658	71.3%
Romania	$17,064,859	99.6%	$25,248,235	65.0%
USSR (Russia for 1994)	$43,627,650	90.5%	$115,873,702	59.4%
Yugoslavia (Serbia for 1994)	$34,816,137	99.7%	$21,053,725	93.4%
Antarctica	$8,454	98.9%	$11,317	10.1%
	$483,785,042		$872,537,021	

Separate Statement of Commissioner James H. Quello

Re: *Motion of AT&T Corporation to be Declared Non-Dominant for International Services*, Report No. DC 96 -

I strongly support this Declaration of Non-Dominance for AT&T Corporation ("AT&T") in the provision of international services. This *Order* complements our previous declaration of non-dominance for AT&T in the domestic interexchange market.[1] The key finding underlying this Declaration is that AT&T no longer possesses market power in the international services market or controls bottleneck facilities.

By being found to be "non-dominant" for IMTS, AT&T is now free regulatorily to do what it has sought to do as a practical matter, that is, compete for customers for international communications. Reclassifying AT&T as non-dominant will remove the regulatory strictures that subjected AT&T, but not its competitors, to price cap regulation and more stringent tariffing and Section 214 requirements. AT&T can now compete on an even footing, without such unnecessary and unproductive regulatory shackles.

I emphasize that, although AT&T has made certain voluntary commitments during the transition period, we do not find AT&T responsible for any structural or systemic problems that may exist in the IMTS market. This Commission must pursue other regulatory devices to spur competition in the provision of international services. Continuation of dominant carrier status would accomplish nothing except inequitably burdening AT&T. Put simply, it is unfair to hold AT&T responsible for "problems" that we have not clearly identified, that they did not create, and that they cannot fix.

We are freeing AT&T from outdated constraints to allow it to compete fully in the IMTS market. All existing and potential customers will benefit thereby and for that public interest reason I am happy to support this item.

[1] *Motion for Reclassification of American Telephone and Telegraph Company as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995).

SEPARATE STATEMENT OF COMMISSIONER RACHELLE B. CHONG

Re: *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*

In declaring AT&T a non-dominant carrier in the market for international services, we lift the final vestige of dominant carrier regulation that exists over this company. This decision is consistent with my regulatory philosophy that competition should trump regulation and that similarly situated competitors should be treated similarly under our rules.

I write separately to acknowledge that although this decision narrows the existing regulatory disparity between AT&T and its competitors, it also recognizes that the market for international services continues to be marred by generic structural problems unrelated to AT&T's market position. The actions we take today will help expedite the trend toward full competition. Competition will provide the best solution for these structural problems. I also believe that, consistent with Congress' goals enunciated in the 1996 Telecommunications Act, new entrants into the U.S. international services market, such as the Bell Operating Companies, will provide the optimum solution to reduce high U.S. international calling prices.

Moreover, just as with our previous dominant carrier regulatory regime for AT&T's domestic services, I believe that the public interest is ill-served by a regulatory process that builds in delay for one service provider and forces it to show its hand to its competitors before it can introduce new service offerings or rate reductions in the market. By eliminating the longer tariff filing notice period applicable only to AT&T and not its competitors, we will help to encourage more price competition in the international service market. Finally, I believe that today's decision is another signal of our continuing steadfast resolve to push for vigorous competition in all foreign telecommunications markets, and that, in time, this procompetitive policy will produce results that solve the outstanding generic structural problems in the world market.

I. INTRODUCTION

1. On September 22, 1993, AT&T Corporation (AT&T) filed a motion with this Commission to be declared non-dominant under Part 61 of the Commission's rules and regulations.[1] On April 24, 1995, AT&T filed an ex parte submission to supplement and update its original motion.[2] As explained below, we find that the record evidence demonstrates that AT&T lacks market power in the interstate, domestic, interexchange market, and accordingly, we grant its motion to be reclassified as a non-dominant carrier with respect to that market.

2. We defer consideration of AT&T's request to be reclassified as non-dominant in its provision of all international services because that category of services requires a different market analysis. We also announce our intention to initiate a new proceeding to consider whether our regulation of interstate, domestic, interexchange services needs to be reexamined in light of our conclusions here regarding the state of that market and our reclassification of AT&T as non-dominant.

II. BACKGROUND

A. The Competitive Carrier Proceeding

3. Between 1979 and 1985, the Commission conducted the Competitive Carrier proceeding,[3] in which it examined how its regulations should be adapted to reflect and

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[1] Motion for Reclassification of American Telephone and Telegraph Company as a Non-Dominant Carrier, CC Docket No. 79-252, filed September 22, 1993 (AT&T Motion).

[2] Ex Parte Presentation in Support of AT&T's Motion for Reclassification as a Non-dominant Carrier, CC Docket No. 79-252, filed April 24, 1995 (AT&T April 24, 1995 Ex Parte Filing). Both the motion and the ex parte submission were put on public notice for comment. We received comments or reply comments from the parties listed in Appendix A.

[3] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (First Report and Order); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Further NPRM); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. (continued...)

promote the increasing competition in telecommunications markets. A major purpose of the Competitive Carrier rulemaking was to reduce or eliminate the application of economic regulation to new competitive entrants, since such entrants would improve market performance as rivals to AT&T and other incumbent, monopoly providers of telecommunications services and should not be viewed as potential monopolists requiring the same degree of economic regulation.

4. In a series of orders, the Commission distinguished two kinds of carriers -- those with market power (dominant carriers) and those without market power (non-dominant carriers). The Commission gradually relaxed its regulation of non-dominant carriers because it concluded that non-dominant carriers could not charge rates or engage in practices that contravene the requirements of the Communications Act of 1934 as amended (Act), since affected customers always had the option of taking service from a dominant carrier whose rates, terms and conditions for interstate service remained subject to close scrutiny by the Commission. The Commission concluded, however, that AT&T, as a dominant carrier, should be subject to the "full panoply" of then-existing Title II regulation.[4]

5. Fifteen years ago, in its First Report and Order, the Commission defined a dominant carrier to be a carrier that "possesses market power."[5] In determining whether a firm possessed market power, the Commission focused on certain "clearly identifiable market features," including "the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services," and whether the firm controlled "bottleneck facilities."[6] With respect to the relevant market within which to assess a carrier's market power, the Commission stated in a footnote that it was treating all

[3](...continued)
Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report and Order), vacated AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report and Order); Sixth Report and Order, 99 FCC 2d 1020 (1985), vacated MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the Competitive Carrier proceeding).

[4] First Report and Order, 85 FCC 2d at 23.

[5] Id. at 20-21. See also 47 C.F.R. § 61.3(o) ("[D]ominant carrier" is defined as a "carrier found by the Commission to have market power (i.e., power to control prices)").

[6] Id.

carriers as single-output firms for purposes of analysis and that a firm's classification as dominant would apply to all its services.[7]

6. In the First Report and Order, the Commission found that "AT&T, including its 23 associated telephone companies and its Long Lines Department, dominates the telephone market by any method of classification."[8] The Commission gave three reasons supporting this finding. First, it noted that AT&T controlled local access facilities for over 80 percent of the nation's phones.[9] Second, the Commission found that AT&T had an "overwhelming" market share of the message toll service (MTS) and wide area telecommunications service (WATS) market and that "the growing demand for long-distance telephone service and the current difficulties of entering this market . . . confer substantial market power upon AT&T."[10] Third, the Commission observed that AT&T's revenues for private line services were more than thirteen times the combined private line revenues of specialized common carriers.[11] In the First Report and Order, the Commission also found to be dominant Western Union, domestic satellite carriers (Domsats), Domsat resale carriers, and miscellaneous common carriers (MCCs) that relayed video signals by terrestrial microwave links.[12] Finally, it found to be non-dominant all other resale carriers and specialized common carriers that provide voice and data services in direct competition with established telephone carriers,[13] and it specifically named MCI Telecommunications Corporation (MCI) and Southern Pacific Communications Company (a predecessor of Sprint Communications Company, L.P. (Sprint)) as being among the specialized common carriers that it was classifying as non-dominant.[14]

7. In the Commission's Fourth Report and Order, issued just before implementation of the AT&T divestiture,[15] the Commission elaborated on its definition of

[7] Id. at 22 n.55.

[8] Id. at 22-23.

[9] Id. at 23.

[10] Id.

[11] Id.

[12] Id. at 24-28.

[13] Id. at 28-30.

[14] Id. at 28 n.69.

[15] In 1982, the Antitrust Division of the Department of Justice and AT&T agreed to (continued...)

market power, citing the definitions of Areeda and Turner, and of Landes and Posner.[16] Areeda and Turner define market power as "the ability to raise prices by restricting output," while Landes and Posner define it as "the ability to raise and maintain prices above the competitive level without driving away so many customers as to make the increase unprofitable."[17] The Commission also defined the relevant product and geographic markets that it would apply in assessing the market power of the carriers covered by the Competitive Carrier proceeding.[18] The Commission found that, for those carriers, "all interstate, domestic, interexchange telecommunications services comprise a single relevant product market with no relevant submarkets."[19] It further found that "there is a single national relevant geographic market (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points)."[20] The Commission stated in a footnote, however, that it was not considering in that proceeding the appropriateness of applying this market definition in assessing the market power of AT&T. Rather, the Commission left this determination to a separate proceeding.[21] That same day, the Commission issued a notice of inquiry (NOI) that

[15](...continued)
enter into a consent decree to settle the Government's antitrust suit against AT&T. The tentative settlement was subsequently entered, with modifications, by the United States District Court for the District of Columbia. See United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982) (Modification of Final Judgment or MFJ), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (approving MFJ); United States v. AT&T, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983) (approving Plan of Reorganization). See generally Michael K. Kellogg, John Thorne & Peter W. Huber, Federal Telecommunications Law 206-248 (1992).

[16] Fourth Report and Order, 95 FCC 2d at 558.

[17] Id.

[18] Id. at 562-75. The carriers identified as covered by the Competitive Carrier proceeding were: MCCs, Domsat, Domsat resellers, domestic operations of Western Union Telegraph Company, domestic services of international record carriers and other record carriers, interexchange carriers affiliated with exchange telephone companies, specialized common carriers, and terrestrial resellers. Id. at 563 n.23. MCI and Sprint (then doing business as GTE Sprint) were among the specialized common carriers subject to the proceeding. See id. at 555 n.2.

[19] Id. at 563-64.

[20] Id. at 574-75.

[21] Id. at 563 n.24.

addressed the issue of assessing AT&T's market power, but subsequently closed that docket without issuing an order.[22]

B. Subsequent Proceedings

1. AT&T Price Cap Regulation

8. In 1989, the Commission adopted a new price cap regulatory regime for AT&T that was intended to encourage AT&T to provide service more efficiently by capping rates, not profits.[23] Under this scheme, AT&T's services were divided into three baskets: residential and small business services, 800 toll-free services, and all other business services.[24] The Commission explained that residential and small business services were placed in a separate basket, "so that AT&T will not be able to raise prices for these services in order to lower prices for services that larger business customers use."[25] In order further to protect residential customers, the Commission created separate service categories for day, evening, and night/weekend MTS, and subjected evening and night/weekend categories to an upward band increase of only four percent per year. In addition, it prohibited AT&T from raising the average residential rate per minute by more than one percent per year above the price cap index (PCI).[26] Several AT&T services targeted to large business customers,

[22] See Long-Run Regulation of AT&T's Basic Domestic Interstate Services, CC Docket No. 83-1147, Notice of Inquiry, 95 FCC 2d 510 (1983). The Commission closed the NOI docket in 1990 on the basis that fundamental changes in the telecommunications industry had rendered the docket record stale. Long-Run Regulation of AT&T's Basic Domestic Interstate Services, CC Docket No. 83-1147, Order, 5 FCC Rcd 5411 (1990). See also Decreased Regulation of Certain Basic Telecommunications Services, CC Docket No. 86-421, Notice of Proposed Rulemaking, 2 FCC Rcd 645 (1987) (suggesting a service-specific approach to streamlining the regulation of certain dominant carrier services); Decreased Regulation of Certain Basic Telecommunications Services, CC Docket No. 86-421, Order, 5 FCC Rcd 5412 (1990) (terminating the NPRM because fundamental changes in the telecommunications industry had rendered the docket record stale).

[23] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (AT&T Price Cap Order); Erratum, 4 FCC Rcd 3379 (1989); Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 665 (1991) (AT&T Price Cap Reconsideration Order).

[24] AT&T Price Cap Order, 4 FCC Rcd at 3051-65.

[25] Id. at 3052.

[26] Id. at 3054, 3060.

including its Tariff 12, Tariff 15, and Tariff 16 services, were not placed under price cap regulation.[27]

2. The Interexchange Competition Proceeding

9. In 1990, the Commission commenced the Interexchange Competition proceeding to examine the state of competition in the interstate long-distance marketplace, and to assess the efficacy of existing regulation in light of this competition.[28] In two orders issued in that proceeding in 1991 and 1993, the Commission recognized that interstate interexchange competition had increased.[29] In assessing the level of competition, the Commission considered the following primary factors: (1) demand elasticity; (2) supply elasticity (and in particular the supply capacity of existing competitors); (3) the relationship of AT&T's prices to its price cap; (4) AT&T's market share; (5) relative cost structures of AT&T and its competitors; and (6) AT&T's size and resources.[30] The Commission found that business services (except analog private line) and 800 services (except 800 directory assistance) had become "substantially competitive" and, accordingly, streamlined its

[27] Tariff 12, first filed in 1987, is a tariff under which AT&T integrates a variety of separately tariffed services into a single contract or option. AT&T has filed numerous Tariff 12 contracts with the Commission. Tariff 15 is a tariff within which AT&T files "competitive pricing plans" (CPPs) which are designed to meet competitors' offers to individual customers. Tariff 16 is a tariff under which AT&T provides services to governmental entities.

[28] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990) (Interexchange Competition NPRM); Report and Order, 6 FCC Rcd 5880 (1991) (First Interexchange Competition Order); Order, 6 FCC Rcd 7255 (Com Car. Bur. 1991); Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991); Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992); Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2659 (1993); Second Report and Order, 8 FCC Rcd 3668 (1993) (Second Interexchange Competition Order); Memorandum Opinion and Order, 8 FCC Rcd 5046 (1993); Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 (1995) (February 1995 Interexchange Reconsideration Order) (collectively referred to as the Interexchange Competition proceeding).

[29] See First Interexchange Competition Order and Second Interexchange Competition Order.

[30] First Interexchange Competition Order, 6 FCC Rcd at 5885-92.

regulation of those AT&T services.[31] In analyzing business and 800 services, the Commission did not address the relevant product and geographic market nor whether AT&T possessed market power within the relevant market.[32] The Commission stated:

> To implement the regulatory changes we adopt here, we need not address whether, in strict economic terms, all domestic interstate, interexchange services continue to comprise a single product market. Contrary to the arguments of AT&T and MCI, the existence of one market does not require either that we treat all services in that market identically for regulatory purposes, or that we find all services in that market equally competitive before adopting regulatory changes for one subset of services. Thus, for example, in the price cap proceeding, we adopted price cap regulation for many, but not all, of AT&T's services. We then divided those services subject to price cap regulation into three separate baskets, in part to avoid cross-subsidies between groups of services that we recognized might be subject to differing levels of competition. We also did not apply precisely the same regulation to the services in the three baskets.[33]

In January 1995, the Commission issued an order that streamlined the regulation of AT&T's commercial services for small business customers.[34]

[31] First Interexchange Competition Order, 6 FCC Rcd at 5887; Second Interexchange Competition Order, 8 FCC Rcd at 3671. Under "streamlined" regulation, AT&T is allowed to file tariffs for these services on fourteen days' notice, such tariffs are presumed lawful for purposes of advance tariff review, and AT&T is not required to file cost support with these tariffs. Price cap ceilings, bands and rate floors do not longer apply to streamlined services. First Interexchange Competition Order, 6 FCC Rcd at 5894; see also Second Interexchange Competition Order, 8 FCC Rcd at 3671.

[32] The Commission stated only that "substantial demand and supply elasticities . . . limit AT&T's ability to exercise market power. . . ." Id. at 5887.

[33] First Interexchange Competition Order, 6 FCC Rcd at 5881-82 n.6.

[34] Revisions to Price Cap Rules for AT&T Corp., CC Docket No. 93-197, Report and Order, 10 FCC Rcd 3009, 3014 (1995) (1995 AT&T Price Cap Order). We streamlined regulation of AT&T's commercial services in the same manner as AT&T's business and 800 services.

C. Effects of Reclassifying AT&T as Non-Dominant

10. As a dominant carrier, AT&T is *subject* to price cap regulation for nonstreamlined services, and to more specific tariffing and Section 214 requirements than non-dominant carriers. The price cap regulatory regime groups AT&T's domestic services into three baskets and requires that the weighted average of rates for services within a basket remain below the applicable PCI. Four categories of AT&T's services are subject to price cap regulation: (1) residential long distance service (including international MTS); (2) operator services; (3) 800 directory assistance; and (4) analog private-line service. Under the current tariffing requirements, AT&T must, depending on the type of tariff at issue, file a tariff on either 14, 45 or 120 days' notice instead of the one-day notice required of non-dominant carriers.[35] Tariffs for streamlined services must be filed on 14 days' notice.[36]

11. AT&T also is required to obtain specific prior Commission approval in order to construct a new line, extend a line, or acquire, lease or operate any line.[37] The Commission has simplified this process for AT&T.[38] AT&T files an annual "blanket" Section 214 application for all construction planned for the year.[39] Any additional, unplanned project that will cost more than $2 million to construct requires a separate formal application.[40] The application must include a statement showing how the proposed construction will serve the public interest. For additional, unplanned construction projects under $2 million, AT&T may file an *informal* application under which the addition is presumed lawful.[41] Nevertheless, AT&T has not received the broader comprehensive blanket Section 214 authority granted to non-dominant carriers in the Competitive Carrier proceeding.[42] AT&T also must obtain Section 214 approval before it may *discontinue, reduce or impair service.*[43]

[35] See 47 C.F.R. § 61.58(c).

[36] See id. at § 61.58(c)(6).

[37] Id. at §§ 63.01 et seq.

[38] Id. at §§ 63.06, 63.02-63.03.

[39] Id. at § 63.06.

[40] See id. at § 63.01.

[41] See id. at § 63.02-63.03.

[42] See First Report and Order, 85 FCC 2d at 39-40.

[43] 47 C.F.R. § 63.62.

12. Our declaration here that AT&T is non-dominant will have several effects. First, AT&T will be freed from price cap regulation for its residential, operator, 800 directory assistance, and analog private-line services.[44] Second, pursuant to our tariff filing rules for non-dominant carriers, AT&T will be allowed to file tariffs for all of its domestic services on one day's notice, and the tariffs will be presumed lawful.[45] AT&T will also no longer have to report or file carrier-to-carrier contracts.[46] Third, several Section 214 requirements will either be reduced or eliminated by declaring AT&T non-dominant. AT&T will automatically be authorized to extend service to any domestic point, and to construct, acquire, or operate any transmission lines, as long as it obtains Commission approval for the use of radio frequencies.[47] AT&T will also only have to report additional circuits to the Commission on a semi-annual basis.[48] Further, requests to discontinue or reduce service will be deemed granted after 31 days unless a party or the Commission objects.[49] Fourth, as a non-dominant carrier not subject to price cap regulation, AT&T will not have to submit cost-support data now required for above-cap and out-of-band filings, or the additional

[44] Because we are deferring consideration of AT&T's market power in international markets, Basket 1 international services will remain under price cap regulation.

[45] Tariff Filing Requirements for Nondominant Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) (Tariff Filing Requirements Order), vacated Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995); Order on Remand, FCC 95-399, at paras. 8-9 (rel. September 27, 1995) (Tariff Filing Requirements Remand Order); First Report and Order, 85 FCC 2d at 31-33.

[46] See 47 C.F.R. § 43.51.

[47] 47 C.F.R. § 63.07(a).

[48] Id. at § 63.07(b).

[49] Specifically: (a) AT&T will be required to notify all affected customers in writing of the planned discontinuance, reduction or impairment unless the Commission authorizes another form of notice in advance; (b) AT&T will be required to file with the Commission an application indicating the change in service, on or after the date on which notice has been given to all affected customers; (c) the application will be automatically granted on the 31st day after AT&T files its application with the Commission, unless the Commission has otherwise notified AT&T. See 47 C.F.R. § 63.71.

information it is now required to submit with tariff filings for new services[50] and services subject to price caps.[51] Fifth, declaring AT&T non-dominant will release AT&T from some annual reporting requirements, including requirements that it file several ARMIS-like reports, an annual financial report, a depreciation rate report, an annual rate-of-return report, and a report on access minutes.[52]

13. Declaring AT&T non-dominant will not remove AT&T from regulation. Like other non-dominant carriers, AT&T will still be subject to regulation under Title II of the Act. Specifically, non-dominant carriers are required to offer interstate services under rates, terms and conditions that are just, reasonable and not unduly discriminatory (Sections 201-202), and non-dominant carriers are subject to the Commission's complaint process (Sections 206-209). Non-dominant carriers also are required to file tariffs pursuant to our streamlined tariffing procedures (Sections 203, 205) and to give notice prior to discontinuance, reduction or impairment of service.[53]

III. AT&T'S SUBMISSIONS SEEKING RECLASSIFICATION AS A NON-DOMINANT CARRIER

14. On September 22, 1993, AT&T filed its motion requesting that it be reclassified as a non-dominant carrier and regulated in the same manner as its interexchange competitors.[54] AT&T states that it seeks no change in the Commission's rules, but only to be reclassified as a non-dominant carrier under the existing rules. AT&T states that market conditions have changed dramatically since it was classified as dominant and that it no longer meets the criteria for dominance we established in our previous orders. Specifically, AT&T argues that it no longer owns or controls any bottleneck facilities.[55] It further argues that its largest facilities-based competitors, MCI and Sprint, are no longer "infants" that lack maturity, but rather have billions of dollars in revenues[56] and have enough readily available

[50] See id. at §§ 61.38, 61.49.

[51] See id. at §§ 61.38, 61.41-61.44, 61.49.

[52] See id. at §§ 43.21, 43.22, 43.43.

[53] Although the Commission instituted streamlined Section 214 discontinuance procedures for non-dominant carriers, the Commission made clear that "[i]f a petition to deny were filed, we would act on the petition prior to any discontinuance." First Report and Order, 85 FCC 2d at 7-8 n.13.

[54] AT&T Motion.

[55] Id. at 7.

[56] Id. at 9-10.

capacity to constrain AT&T's market behavior and thus make monopoly pricing by AT&T unprofitable.[57]

15. Subsequently, on April 24, 1995, AT&T filed an ex parte submission supplementing and updating materials it previously filed in support of its motion for reclassification as a non-dominant carrier.[58] Among other things, AT&T asserts that technological advances, enormous network capital expenditures, and infusions of foreign capital have given its competitors sufficient excess capacity to absorb one-third of AT&T's switched traffic within ninety days, and almost two-thirds within one year, with only modest expense.[59] AT&T also argues that customers have more competitive choices in every market segment, and customers are taking advantage of these additional choices as evidenced by their willingness to switch carriers.[60]

16. AT&T argues that continuing to regulate it as a dominant carrier imposes direct costs on carriers and customers, and does not facilitate a competitive market for interstate, domestic, interexchange services.[61] AT&T claims that, despite loss of market power, it continues to be subjected to "burdensome and unequal" regulation that unfairly advantages its competitors and deprives consumers of price reductions and innovative service offerings. Regulation of AT&T as a dominant carrier, it argues, also wastes Commission resources that instead could be utilized in areas where regulation may be more appropriate, such as the opening up of local exchange and foreign markets.[62]

17. On September 21, 1995, AT&T filed an ex parte letter in which AT&T specifies certain actions that it voluntarily commits to undertake to address concerns raised in the record regarding the effects of reclassifying AT&T.[63] AT&T maintains in its letter that these concerns are "misplaced" because "for the most part" they "have no logical connection to AT&T's regulatory classification," and, insofar as they implicate important policy issues, "they apply with equal force to all interexchange carriers and have nothing to do with market

[57] Id. at 7-8.

[58] AT&T April 24, 1995 Ex Parte Filing.

[59] Id. at 13-19.

[60] Id., Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig at 141.

[61] AT&T Motion at 16-17.

[62] Id. at 17-19.

[63] AT&T September 21, 1995 ex parte letter from R. Gerard Salemme, Vice President - Government Affairs, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission (AT&T September 21, 1995 Ex Parte Letter).

power."[64] Nevertheless, AT&T sets forth in the letter various voluntary commitments, which it describes as "transitional provisions," that are intended to allay these concerns, pending the Commission's review of its current scheme for regulating interexchange carriers. In that regard, AT&T renews its request that the Commission commence an examination of the interexchange industry "to consider whether appropriate rules for all carriers should be adopted."[65] The commitments AT&T proffers in its letter concern: analog private line service, 800 directory assistance service, service to and from Alaska, Hawaii, and other regions subject to the Commission's rate integration policy, tariff filings that would result in geographically deaveraged rates, tariff filings that implement changes to contract tariffs that are adverse to customers of those tariffs, service to low-income and other customers, and resolution of disputes with reseller customers. Numerous parties filed ex parte letters in response, which are described below.[66]

18. In response to a letter from the Common Carrier Bureau seeking clarification of AT&T's September 21, 1995 ex parte letter,[67] AT&T filed an ex parte letter on October 5, 1995 in which it clarified a number of its voluntary commitments relating to its low-income and low-volume safety net plans, tariff filings that implement contract tariff changes that are adverse to customers of those tariffs, 800 directory assistance and analog private line services, and dispute resolution guidelines for disputes arising between AT&T and its reseller customers.[68] TRA filed an ex parte letter supporting the safeguards for resellers that were described in AT&T's October 5, 1995 ex parte clarification letter.[69]

[64] AT&T September 21, 1995 Ex Parte Letter at 1 (emphasis in original).

[65] Id.

[66] The State of Hawaii September 25, 1995 ex parte letter from Marc Berejka, Squire, Sanders & Dempsey, to William F. Caton, Acting Secretary, Federal Communications Commission (Hawaii September 25, 1995 Ex Parte Letter); Ad Hoc Telecommunications Users Committee September 29, 1995 ex parte letter from James S. Blaszak, Levine, Blaszak, Block & Boothby, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission (Ad Hoc Committee September 29, 1995 Ex Parte Letter); MCI October 2, 1995 ex parte letter from Donald F. Evans, Vice President - Federal Regulatory Affairs, to William F. Caton, Acting Secretary, Federal Communications, Commission (MCI October 2, 1995 Ex Parte Letter); LEC Joint Commenters October 3, 1995 ex parte letter from Charles D. Cosson, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission (LEC Joint Commenters October 3, 1995 Ex Parte Letter); Alaska PUC October 4, 1995 ex parte letter from Don Schroer, Chairman, to William F. Caton, Acting Secretary, Federal Communications Commission (Alaska PUC October 4, 1995 Ex Parte Letter); State of Alaska October 4, 1995 ex parte letter from John W. Katz, to William F. Caton, Acting Secretary, Federal Communications Commission (Alaska October 4, 1995 Ex Parte Letter); and BellSouth October 5, 1995 ex parte letter from Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to William F. Caton, Acting Secretary, Federal Communications Commission (BellSouth October 5, 1995 Ex Parte Letter).

[67] October 4, 1995 letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission, to R. Gerard Salemme, Vice President - Government Affairs, AT&T Corp. (Wallman October 4, 1995 Letter).

[68] AT&T October 5, 1995 ex parte letter from R. Gerard Salemme, Vice President-Government Affairs, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission (AT&T October 5, 1995 Ex Parte Letter).

[69] TRA October 5, 1995 ex parte letter from Ernest B. Kelly, III, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission (TRA October 5, 1995 Ex Parte Letter).

IV. ANALYSIS

A. Definition of the Relevant Product and Geographic Market and the Standard for Assessing Market Power

19. A dominant carrier is defined as a carrier that possesses market power, and a non-dominant carrier is defined as a carrier not found to be dominant (i.e., one that does not possess market power).[70] Accordingly, in order to determine whether AT&T should now be classified as a non-dominant carrier, we must assess whether AT&T possesses market power. Preliminary to that assessment, however, we must: (1) identify the relevant product and geographic markets for assessing AT&T's market power; and (2) determine how to assess whether, within that market, AT&T has market power.

20. With respect to the definition of the relevant market, AT&T, citing the Fourth Report and Order, maintains that the Commission has repeatedly found that "interstate, domestic, interexchange services" is the relevant market for assessing an interexchange carrier's market power for the purpose of determining whether a firm should be declared dominant.[71] AT&T contends that the Commission must grant AT&T's motion if we find that AT&T lacks market power in the overall market for interstate, domestic, interexchange telecommunications services, even if we find that AT&T still may have the ability to control the price of discrete services within the defined market.[72] Although no party specifically

[70] 47 C.F.R. §§ 61.3(o), 61.3(t).

[71] AT&T April 24, 1995 Ex Parte Filing at 1 n.2.

[72] AT&T September 1, 1995 ex parte letter from R. Gerald Salemme, Vice President-Government Affairs, AT&T Corp., to William F. Caton, Acting Secretary, Federal Communications Commission (AT&T September 1, 1995 Ex Parte Letter).

disputes AT&T's contentions regarding the relevant market and the standard for assessing *market* power, numerous parties nonetheless argue that AT&T has the ability to control prices of discrete services and therefore should not be reclassified as non-dominant.[73]

21. We agree with AT&T that in this case we should use the "all interstate, domestic, interexchange services" market definition adopted in the Fourth Report and Order. While the Commission has never explicitly applied the market definition articulated in the Fourth Report and Order to AT&T in the context of the Competitive Carrier proceeding,[74] we believe that it is appropriate to do so here.

22. As noted above, the Commission stated in the First Report and Order that it was treating all interexchange carriers as single-output firms for purposes of classifying firms as dominant or non-dominant.[75] The Commission affirmed that approach in the Fourth Report and Order by adopting a product market definition of "all interstate, domestic, interexchange services . . . with no relevant submarkets."[76] The Commission also there defined a "single national relevant geographic market (including Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, and other U.S. offshore points)."[77] As noted above, this definition was applied in classifying all of AT&T's competitors as non-dominant carriers.[78] We see no basis for determining whether AT&T is non-dominant under a different standard than that used for classifying its competitors.

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[73] See, e.g., CNS November 12, 1993 Comments at 9-23; MCI November 12, 1993 Comments at 8; PhoneTel November 12, 1993 Comments at 2; ETL December 3, 1993 Reply Comments at 4-6; CTA June 9, 1995 Comments at 12-19; Sprint June 30, 1995 Reply Comments at 2; MCI October 2, 1995 Ex Parte Letter at 1.

[74] See Fourth Report and Order, 95 FCC 2d at 563 n.24 ("Pursuant to our step-by-step approach in this rulemaking, we do not consider here the appropriateness of applying this market definition in assessing the market power of AT&T").

[75] First Report and Order, 85 FCC 2d at 22 n.55. The Commission acknowledged that this was a conservative approach to regulation, and it noted that it would address the issue of the regulation of multi-output carriers in a future proceeding. Id. Although the Commission subsequently proposed assessing market power on a market-specific basis, it never adopted such an analysis. See Further NPRM, 84 FCC 2d at 498. Rather, in the Fourth Report and Order, the Commission adopted a broader, single relevant market definition. Fourth Report and Order, 95 FCC 2d at 563-73.

[76] Fourth Report and Order, 95 FCC 2d at 564.

[77] Id. at 573-75.

[78] See discussion supra at paras. 6-7.

23. An examination of the supply side of interexchange services also leads us to conclude that AT&T's dominance or non-dominance should be evaluated in the context of this market definition. Substitutability of demand is generally used in the first instance to define a relevant product market, but supply substitutability is also a well-accepted consideration in market definition.[79] In this instance, while consumers do not view residential and business services, for instance, as substitutable, it is clear that there is no significant difference between the interexchange facilities used to provide these services. Thus, in light of this supply substitutablilty, it is reasonable and appropriate to include all domestic, interstate, interexchange services in the *market* for evaluating AT&T's dominance. We note that the Commission used a similar analysis in assessing the competitive effects of the merger of AT&T and McCaw Cellular Communications, Inc., a decision that was upheld by the D.C. Circut.[80] Consequently, we believe it is appropriate for us to evaluate AT&T's market power using this definition as well.

24. Having defined the relevant geographic and product market, we also must *determine* the standard, established by the Competitive Carrier orders, for assessing whether a carrier possesses market power within the relevant market. More specifically, we must examine whether, under the Competitive Carrier decisions, the Commission should reclassify AT&T as non-dominant if the *record* demonstrates that AT&T lacks market power in the overall relevant product market, even if we find that AT&T has the ability to control the price of one or more discrete services; or alternatively whether, under the Competitive Carrier decisions, the Commission should retain AT&T's dominant classification if we find that AT&T has the ability to control the price of one or more discrete services within the relevant market, even if AT&T lacks market power in the overall interstate, domestic, interexchange market.

25. The Commission has never definitively concluded, either in its rules or in the Competitive Carrier orders, that a carrier must demonstrate that it lacks the ability to control the *price* of every *service* that it *provides* in the relevant market before the Commission can classify that carrier as non-dominant. Indeed, Section 61.3(o) of our regulations states only that a dominant carrier is defined as a "carrier found by the Commission to have market power (i.e., the power to control prices)." We believe, in light of the evidence in this case and the state of competition in today's interstate, domestic, interexchange telecommunications

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[79] See, e.g., William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 945 (1981).

[80] Craig O. McCaw and American Telephone and Telegraph Company, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5845-48 (1994), aff'd, sub nom. SBC Communications Inc. v. FCC, 56 F.3d 1484 (D.C. Cir. 1995); see also Application of Alascom Inc., AT&T Corp. and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corp., File Nos. W-P-C-7037, 6520, Order and Authorization, FCC 95-334, at para. 48 (rel. Aug. 2, 1995).

market, we should assess whether AT&T has market power by considering whether AT&T has the ability to control price with respect to the overall relevant market.

26. As our analysis below demonstrates, AT&T does not have the ability unilaterally to control prices in the overall interstate, domestic, interexchange market.[81] The record indicates that, to the extent AT&T has the ability to control price at all, it is only with respect to specific service segments that are either de minimis to the overall interstate, domestic, interexchange market, or are exposed to increasing competition so as not to materially affect the overall market. As our Interexchange Competition orders and the evidence in this case indicate, most major segments of the interexchange market are subject to substantial competition today, and the vast majority of interexchange services and transactions are subject to substantial competition. Accordingly, we believe that assessing AT&T's market power by an "all-services" standard (i.e., requiring AT&T to establish that it lacks the ability to control price in all service segments), would result in a situation where the economic cost of regulation outweighs its public benefits.

27. The cost of dominant carrier regulation of AT&T in this context includes inhibiting AT&T from quickly introducing new services and from quickly responding to new offerings by its rivals. This occurs because of the longer tariff notice requirements imposed on AT&T, which allow AT&T's competitors to respond to AT&T tariff filings covering new services and promotions even before AT&T's tariffs become effective. The longer notice requirements imposed on AT&T thus also reduce the incentive for AT&T to initiate price reductions. In addition, to the extent AT&T were to initiate such strategies, AT&T's competitors could use the regulatory process to delay, and consequently, ultimately thwart AT&T's strategies. Furthermore, such regulation imposes compliance costs on AT&T and administrative costs on the Commission. Accordingly, we believe that in order to promote continued competition in the interstate, interexchange market, and to avoid applying regulation whose costs outweigh its benefits, it is appropriate to assess whether AT&T possesses market power not under an all-services approach, but rather on the basis of whether AT&T possesses market power in the overall relevant market.

28. We recognize that there are instances where the Commission has made statements that could be viewed as suggesting that the Competitive Carrier regime contemplates an all-services approach to assessing a carrier's market power. One such statement occurs in a footnote to the First Report and Order, where the Commission stated that "carriers are eligible for streamlined regulatory procedures only if they are not dominant in the provision of any services."[82] Because the only carriers eligible for streamlined treatment at that time were non-dominant carriers, it could be argued that, by this statement,

[81] See infra Section IV.B.

[82] First Report and Order, 85 FCC 2d at 22 n.55.

the Commission expressed an intention that carriers should be eligible for non-dominant status only if they were not dominant in any service.

29. Also, in the Competitive Carrier Further NPRM, the Commission stated that the "practical result of . . . [its] conservative methodological approach [in the First Report and Order] was to remove some unnecessary regulatory burdens from resale carriers, but only if those carriers were also not dominant in the provision of any other communications service."[83] The Commission also there stated that, under the First Report and Order,

> it is apparent that a carrier may be classified as dominant in a market even if it has only limited market power in that market, and fleeting market power at that. In such a case the costs resulting from the imposition of regulation may be significantly greater than the benefits for consumers, if any, from that regulation.[84]

In another proceeding regarding spectrum allocation, the Commission stated in a footnote that "[i]n the Competitive Carrier rulemaking we generally treated all carriers as single output firms. Thus, firms that are dominant in one service were treated as dominant for all services."[85] Finally, in the Notice of Inquiry in the AT&T Long-Run Regulation proceeding, the Commission stated:

> Implementation of alternative regulatory practices in Competitive Carrier Rulemaking was limited to carriers lacking market power. It may be that we can look to market forces to check all of AT&T's rates and, thereby, its facilities decisions only if AT&T lacks market power in all of its services. However . . . . [a] combination of market forces and regulation of some of AT&T's services may make it desirable to implement alternative regulation of other AT&T services before AT&T lacks market power in all of its services.[86]

[83] Further NPRM, 84 FCC 2d at 498.

[84] Id. at 499.

[85] Amendment of Parts 2, 21, 87, and 90 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, the Use of Radio in Digital Termination Systems for the Provision of Digital Communications Services, General Docket No. 79-188, First Report and Order, 86 FCC 2d 360, 388 n.30 (1981).

[86] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, CC Docket No. 83-1147, Notice of Inquiry, 95 FCC 2d 510, 532-33 (1983).

30. We conclude that the foregoing statements, none of which is codified in the Commission's rules, do not constitute an uncodified rule permitting us to classify AT&T as non-dominant only if we find that AT&T lacks the ability to control the price of every tariffed service in the relevant product market. In McElroy Electronics Corp. v. FCC, the D.C. Circuit stated that the Commission's rules must be stated clearly.[87] In light of the court's reasoning in McElroy, we believe that the Commission's statements in Competitive Carrier described above are insufficient to establish a clear rule pursuant to which AT&T was provided notice that it must satisfy an all-services standard in order to be classified as non-dominant. Moreover, we do not believe that language in other proceedings that may be viewed as characterizing the Competitive Carrier standard as an all-services standard is binding as a matter of law. It is at most a policy with which, for the reasons discussed below,[88] we do not now agree.

31. We note, however, that, even assuming that the Commission's various references to an all-services standard were sufficient to constitute either a policy or a rule promulgated under Competitive Carrier, we believe that the facts of this case warrant either a departure from that policy or a waiver of that rule.

32. It is well-established that the Commission may depart from prior policies as long as it provides a reasoned explanation for doing so.[89] The Commission consistently has stated that when the economic costs of regulation exceed the public interest benefits, the Commission should reconsider the validity of continuing to impose such regulation on the market.[90] At the time we issued the First Report and Order, AT&T controlled bottleneck facilities and was virtually the only supplier of interexchange services. Thus, under 1981 market conditions, AT&T's market power in one segment of the market could have dramatically affected the performance of all market segments. As explained below, however, the interexchange market enjoys substantial competition today. Even though AT&T may be

[87] 990 F.2d 1351, 1351-1362 (D.C. Cir. 1993); accord MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1141-42 (D.C. Cir. 1995).

[88] See infra para. 32.

[89] See California v. FCC, 39 F.3d 919, 925, 930 (9th Cir. 1994).

[90] See, e.g., Fourth Report and Order, 95 FCC 2d at 579-80; Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1479 (1994) (Mobile Services Order); Implementation of Section 19 of the Cable Television Consumer Protection Act of 1992, Annual Assessment of the Status of Competition in the Market for Delivered Video Programming, First Report, 9 FCC Rcd 7442, 7622 (1994); First Interexchange Competition Order, 6 FCC Rcd at 5895; Review of Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, at paras. 18-19 (rel. July 31, 1995).

able to control the price of a small number of services, as we discuss below, the vast majority of interexchange services and transactions are subject to substantial competition.[91] Moreover, as a result of divestiture, AT&T no longer owns bottleneck local access facilities. Thus, we believe that assessing market power by an all-services standard within the context of today's interexchange market would result in a situation where the economic cost of regulation would outweigh its public benefits. Under such regulation, AT&T would be subject to excessive regulatory costs and would be hindered in its ability to respond to moves by its competitors. As a result of the longer tariff notice requirements imposed on AT&T, AT&T would have less incentive and ability to initiate pro-competitive strategies. To the extent AT&T were to initiate such strategies, AT&T's competitors could use the regulatory process to delay, and consequently, ultimately thwart AT&T's strategies. Accordingly, even if it could be demonstrated that the Competitive Carrier cases establish a policy that favors an all-services approach to assessing market power, we believe, for the reasons articulated above, that it is appropriate to depart from that policy in this case.

33. It also is well-established that the Commission has authority to waive its rules if there is good cause to do so.[92] In order to justify a waiver, the Commission must find that application of generally applicable rules would not be in the public interest in the particular circumstances under consideration.[93] The Commission, in waiving the rule, "must explain why deviation [from the rule] better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation."[94] In the present situation, if an all-services rule did exist, we believe good cause exists to waive it in light of AT&T's position in the interstate, domestic, interexchange market and the facts of this case. Specifically, our analysis below demonstrates that to the extent AT&T possesses any market power at all, it is only with respect to specific service segments that are either de minimis relative to the overall interstate, domestic, interexchange market, or exposed to increasing competition so as to not materially affect the overall market. We believe that, in such a situation, the costs of continuing to subject all of AT&T's interstate, domestic, interexchange services to dominant carrier regulation, outweigh the benefits of that regulation. The costs of the dominant carrier regulation of AT&T include inhibiting AT&T from either quickly introducing new services or responding quickly to new offerings by its rivals. In addition, such regulation imposes compliance costs on AT&T and administrative costs on the Commission. These costs, especially when viewed in light of the voluntary commitments made by AT&T to alleviate concerns with respect to specific services, persuade us that the public interest would be better

[91] See infra Section IV.B.2.

[92] 47 C.F.R. § 1.3.

[93] Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[94] Northeast Cellular, 897 F.2d at 1166.

served by waiving any all-services rule in classifying AT&T rather than by applying it. Accordingly, we conclude that there would be good cause to waive such a rule if it actually were in place.

34. Accordingly, we find that the appropriate relevant product and geographic market for assessing whether AT&T possesses market power, for purposes of the Competitive Carrier proceeding, is the interstate, domestic, interexchange telecommunications services market. Moreover, we conclude that we should assess whether AT&T has market power in that relevant market by considering whether AT&T possesses market power in the overall market for interstate, domestic, interexchange services.

B. Classification of AT&T

1. Summary

35. In this section we conclude that AT&T has demonstrated that it should be reclassified as non-dominant in the overall interstate, domestic, interexchange telecommunications market. In assessing whether the record supports such reclassification, we first address whether AT&T possesses market power in the overall interstate, domestic, interexchange market. Based on this analysis, we conclude that, while the long-distance marketplace is not perfectly competitive, AT&T neither possesses nor can unilaterally exercise market power within the interstate, domestic, interexchange market taken as a whole.

36. After finding that AT&T lacks market power in the relevant market, we then consider certain issues raised in the record regarding effects of reclassifying AT&T as non-dominant. We conclude, for reasons given herein, that none of the issues raised warrants a finding that AT&T properly is classified as dominant under our Competitive Carrier regime. Rather, we find that the record supports reclassifying AT&T as non-dominant in the overall, interstate, domestic, interexchange market, and conclude that we should grant AT&T's motion to be reclassified as non-dominant in that market.

37. We note that this determination is not based upon the voluntary commitments offered by AT&T in its September 21, 1995 Ex Parte Letter (as clarified in its October 5, 1995 Ex Parte Letter), but on the economic information in this record regarding AT&T's position in the overall relevant market. In addition, we agree with AT&T that a number of the concerns raised by resellers and other parties in this proceeding are not based on claims that AT&T continues to possess market power in the relevant geographic and product market. As noted at different points in this order, we also agree with AT&T and TRA that we should commence a proceeding to consider whether, in light of our conclusion that AT&T is not dominant in this market, modifications to our existing regulatory scheme for interexchange carriers will advance our public interest goals more effectively. To the extent that parties are suggesting that, even if we conclude that AT&T is no longer dominant, we should defer granting AT&T's motion until we have completed this industry-wide

proceeding, we decline that suggestion. We note, moreover, that AT&T's voluntary commitments are intended to serve as "transitional" arrangements that will address the concerns raised by these parties in the short run. We believe that these voluntary commitments proffered by AT&T may alleviate these policy concerns during this period of regulatory transition. We, therefore, accept all of AT&T's commitments, and order AT&T's compliance with those commitments. We note that AT&T's failure to comply with its commitments may result in the imposition of fines or forfeitures upon AT&T (pursuant to Section 503(b) of the Act) or a revocation of its radio licenses (pursuant to Sections 312(a) of the Act).[95] In addition, we will reject as unreasonable on its face any tariff filing that contravenes AT&T's commitments.[96]

2. Assessment of AT&T's Market Power

38. In this section we assess whether AT&T possesses market power in the overall interstate, domestic, interexchange market. Applying well-accepted principles of antitrust analysis, the following discussion first focuses on: (1) AT&T's market share; (2) the supply elasticity of the market; (3) the demand elasticity of AT&T's customers; and (4) AT&T's cost structure, size and resources. Our analysis of AT&T's market power thus begins with an assessment of these general characteristics of the interstate, domestic, interexchange market.[97] We then address arguments raised by commenters that AT&T has the ability to control the price of specific services within the overall relevant market. The issues we address relate to: (1) AT&T's residential services pricing; (2) AT&T's business and 800 toll-free services; (3) AT&T's operator and calling card services; (4) AT&T's analog private

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[95] See 47 U.S.C. §§ 503(b) and 312(a); Revocation of the Licenses of Pass Word, Inc., 76 FCC 2d 465 (1980), aff'd sub nom. Pass Word, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir. 1982) (common carrier license revoked based on carrier's deliberate misrepresentation to the Commission).

[96] In its September 21, 1995 ex parte letter, AT&T states that it "acknowledges that contravention of the terms of this letter could be considered by the Commission in determining whether the applicable tariff changes are reasonable." AT&T September 21, 1995 Ex Parte Letter at 3. We interpret this paragraph as AT&T's acknowledgment that, if it files a tariff that contravenes any of the commitments contained in this letter, the Commission can consider this contravention in determining whether the tariff is reasonable on its face and can reject on the basis that it contravenes a commitment.

[97] See Phillip E. Areeda, Herbert Hovenkamp, & John L. Solow, IIA Antitrust Law: An Analysis of Antitrust Principles and Their Application 83-302 (1995); William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 945-52 (1981); E. Thomas Sullivan and Jeffery L. Harrison, Understanding Antitrust and Its Economic Implications 222-24 (1988).

line and 800 directory assistance services; and (5) AT&T's service to and from Alaska and Hawaii.

39. We find that AT&T neither possesses nor can exercise individual market power within the interstate, domestic, interexchange market as a whole. While we acknowledge that AT&T may still be able to control the price of a few discrete services, we do not find that this justifies a finding that AT&T possesses market power in the overall relevant market.

a. General Characteristics of the Interstate, Domestic, Interexchange Market

(1) Pleadings

(a) Market Share

40. Numerous commenters argue that AT&T's market share of the long-distance market (60 percent measured in terms of minutes in 1993) is prima facie evidence that AT&T remains dominant in the long-distance market.[98] Sprint points out that a 60 percent market share alone generates a Herfindahl-Hirschman index (HHI) of 3600 -- twice as high as the level (1800) set by the Department of Justice (DOJ) as defining a "highly concentrated market."[99] Several commenters also assert that the other 40 percent is divided among 500

[98] LDDS November 12, 1993 Comments at 1-3; Sprint November 12, 1993 Comments at 6-8; Ad Hoc IXCs November 12, 1993 Comments at 23-28; TRA November 12, 1993 Comments at ii; PhoneTel November 12, 1993 Comments at 10; ANI November 12, 1993 Comments at 39; ETC December 3, 1993 Reply Comments at 2; GCI December 3, 1993 Reply Comments at 2; MPC December 3, 1993 Reply Comments at 2; TFG June 9, 1995 Comments at 7; WilTel November 12, 1993 Comments at 8; ETS November 12, 1993 Comments at 7 n.19, 8; MPC December 3, 1993 Reply Comments at 2; GCI December 3, 1993 Reply Comments at 2; IDCMA June 9, 1995 Comments at 5; TRA June 9, 1995 Comments at 8; GCI June 30, 1995 Reply Comments at 2; Oncor June 9, 1995 Reply Comments at 1; MCI June 9, 1995 Comments at 2; CompTel June 9, 1995 Comments at 10; TRA June 9, 1995 Comments at 8.

[99] Sprint November 12, 1993 Comments at 6-8. The HHI is a measure of market concentration that is calculated by summing the squared market shares of all of the firms in the market. See F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance 70-73 (3rd Ed. 1990). Similarly, TRA argues that, if a firm were to try to duplicate AT&T's market share through a merger, the DOJ would likely challenge the effort. TRA November 12, 1993 Comments at 8; see also TRA (continued...)

carriers -- many of which are resellers, who either primarily or exclusively resell AT&T's services.[100] TRA adds that most of AT&T's "hundreds of competitors" are switchless resellers that control only two percent of the interstate market.[101] Ad Hoc IXCs note that AT&T's market share is over four times that of its nearest competitor, MCI.[102]

41. In its initial reply comments, AT&T argues that the steady decline of its market share of interstate switched minutes is wholly inconsistent with its retaining market power.[103] Relying on the First Interexchange Competition Order, AT&T claims that the Commission has found that a substantial market share "is not wholly incompatible with a highly competitive market."[104] AT&T also contends that the fact that the rate of decline in AT&T's market share is less than it was in the years immediately following divestiture, proves that competition in long-distance has matured because sharp changes in market shares in a competitive environment are unusual.[105] AT&T argues that its declining market share coupled with consumers' increasing willingness to switch carriers (i.e. high churn rate) further demonstrate its lack of market power.[106]

42. In its April 24, 1995 Ex Parte Filing, AT&T contends that market share alone is not a valid measure of market power in any aspect of the interexchange market because: (a) competitors' excess capacity constrains AT&T's ability to restrict output; and (b) AT&T's aggregate share does not reflect the extraordinary amount of consumer "churn" currently occurring in the marketplace. Thus, AT&T argues that market share figures based solely

[99](...continued)
June 9, 1995 Comments at 10. IDCMA asserts that the entire interexchange service market generates an HHI of 3935 -- indicating a highly concentrated market. IDCMA November 3, 1993 Comments at 10; see also IDCMA June 9, 1995 Comments at 5.

[100] ETS November 12, 1993 Comments at 7, n.19; Sprint November 12, 1993 Comments at 11; TRA November 12, 1993 Comments at 7; Joint Bell Companies November 12, 1993 Comments at 5; ANI November 12, 1993 Comments at 25.

[101] TRA November 12, 1993 Comments at 7.

[102] Ad Hoc IXCs November 12, 1993 Comments at 24; see also ETC December 3, 1993 Reply Comments at 2; Sprint November 12, 1993 Comments at 8; TRA November 12, 1993 Comments at 7; CompTel November 12, 1993 Comments at 10-11.

[103] AT&T December 3, 1993 Reply Comments at 16-17.

[104] Id. at 16 n.30 (quoting First Interexchange Competition Order, 6 FCC Rcd at 5890).

[105] Id. at 17.

[106] AT&T Motion at 14-15.

upon output – rather than on total available capacity – distort the importance of market share as an indicator of market power.[107]

43. AT&T asserts that none of the opposing commenters attempts to refute any of the key facts showing that AT&T lacks market power under the criteria the Commission has established in this proceeding.[108] Moreover, AT&T argues that the Commission has long recognized, and no commenter in this proceeding has disputed, that market share is the least important and least reliable indicator of market power, especially in markets with high supply and demand elasticities.[109] NYNEX and US West agree that market share alone is not a determinative measure of market power, and NYNEX suggests that the Commission should consider a number of factors, including ease of market entry, presence of alternative supply sources, demand for services from alternative carriers, and substitutability of services.[110] CSE argues that facilities-based competition is vigorous and that even large size, large market share, and high profits can be consistent with the existence of vigorous competition because the competitive process tends to reward firms that do a better job of creating value for customers at lower cost.[111]

44. IDCMA argues that a significant portion of AT&T's arguments consist of academic theory intended to prove that AT&T lacks the ability to act anti-competitively. IDCMA asserts that the Supreme Court made clear in the Kodak case that decisions about market power must be based on "economic realit[ies] of the market at issue," rather than unsupported speculation or abstract theories.[112]

(b) Supply Elasticity

45. AT&T contends that, because supply is elastic, it cannot possess or exercise market power. In support, AT&T argues that: (1) network capacity has continued to expand; (2) carriers other than MCI and Sprint have increased their network capacity through new construction, acquisition, or both, and have also increased the diversity of their offerings; and (3) MCI, Sprint, and other interexchange carriers have introduced a plethora of highly successful offerings designed for and marketed to residential customers, which

[107] AT&T April 24, 1995 Ex Parte Filing at 30-35.

[108] AT&T June 30, 1995 Reply Comments at ii, 3-8.

[109] Id. at 10-11.

[110] NYNEX June 9, 1995 Comments at 6; US West June 9, 1995 Comments at 1-2.

[111] CSE June 9, 1995 Comments at 3.

[112] IDCMA June 9, 1995 Comments at 4 (citing Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451, 467 (1992)).

increase their visibility and reinforce the nature and scope of choices available to consumers.[113]

46. In its 1993 motion, AT&T argues that its competitors have more than enough readily available capacity to constrain AT&T's market behavior and inhibit it from charging excessive rates.[114] AT&T asserts that in 1993 there were: (1) more than 500 long-distance carriers providing service in the United States, 394 of which provided equal access service in at least one state; (2) nine carriers that purchased equal access in, and served, at least 45 states; (3) 81 regional carriers that served at least four states; and (3) at least twelve interexchange carriers serving every state.[115] AT&T also claims that its competitors had about one and a half times the amount of fiber as AT&T.[116]

47. In its April 1995 ex parte submission, AT&T claims that: MCI and Sprint alone can now absorb fifteen percent of AT&T's total 1993 switched demand at no incremental network capital cost;[117] within 90 days MCI, Sprint and LDDS/WilTel, using their existing equipment, could take nearly one-third of AT&T's switched traffic;[118] and within twelve months AT&T's largest competitors could absorb another 31 percent of AT&T's total switched traffic (making a total of almost two-thirds), by using currently lit fiber and adding switched ports, at a cost of about $660 million.[119] According to AT&T, the factor limiting supply expansion is not the availability of transport facilities, but rather the availability of sufficient switched ports from the manufacturers. AT&T asserts that these

[113] AT&T December 3, 1993 Reply Comments at 12-14.

[114] AT&T Motion at 8. See also API December 3, 1993 Reply Comments at 3. But see WilTel December 3, 1993 Reply Comments at 2 (WilTel argues that AT&T failed to demonstrate that its competitors possess the ability to restrain its market power).

[115] AT&T Motion at 9.

[116] Id. at 8.

[117] AT&T April 24, 1995 Ex Parte Filing at 15; AT&T June 30, 1995 Reply Comments at 11.

[118] AT&T April 24, 1995 Ex Parte Filing at 16; AT&T June 30, 1995 Reply Comments at 11. According to AT&T, this would reduce AT&T's market share to less than 40 percent in three months. AT&T April 24, 1995 Ex Parte Filing at 16.

[119] AT&T April 24, 1995 Ex Parte Filing at 16-17. The provision of fiber optic lines without the necessary electronic equipment to power the fiber is commonly known as dark fiber service, and is distinguishable from lit fiber service, which consists of the provisioning of fiber optic lines with all necessary electronic equipment for powering those lines.

facts show that AT&T cannot control the supply of interexchange services and that there are no barriers to entry into the long-distance market.[120]

48. AT&T further argues that numerous facilities-based and other carriers, in addition to AT&T, provide residential, international MTS, and operator services. AT&T contends that, because excess capacity controlled by facilities-based carriers could be used to provide virtually any type of long-distance service, no interexchange carrier can charge supra-competitive rates for any service.[121]

49. AT&T also asserts that equal access is available on over 97 percent of the telephone lines in the country, and claims there are 458 carriers who purchase access, with nine serving 45 or more states, and with 126 regional carriers serving four or more states.[122] AT&T further asserts that its chief rivals -- Sprint, MCI and LDDS -- are "thriving."[123]

50. Some parties, such as API and CSE, agree that excess capacity constrains AT&T.[124] CSE also asserts that resellers are viable competitors in the long-distance market.[125]

51. Most commenters, however, challenge AT&T's excess capacity contentions.[126] Sprint argues that the possession of fiber in the ground by AT&T's competitors does not automatically mean that they have "excess" capacity that can mitigate AT&T's market power. According to Sprint, fiber (especially dark fiber) is only one element needed to provide interexchange service.[127] Sprint contends that it is a costly and time-consuming project to supplement billing, customer service, and switching systems to accommodate large

[120] Id. at 13-19.

[121] AT&T Motion at 14.

[122] AT&T April 24, 1995 Ex Parte Filing at 20.

[123] Id. at 21-23.

[124] API December 3, 1993 Reply Comments at 5; CSE June 9, 1995 Comments at 6-7.

[125] CSE June 9, 1995 Comments at 6-7.

[126] Sprint November 12, 1993 Comments at 11-12; WilTel November 12, 1993 Comments at 11; Joint Bell Companies November 12, 1993 Comments at 6-7; Ad Hoc IXCs November 12, 1993 Comments at 26.

[127] Sprint November 12, 1993 Comments at 11-12; see also WilTel December 3, 1993 Reply Comments at 3.

numbers of customers who might leave AT&T because of unreasonable prices.[128] Sprint further contends that, because AT&T could readily decrease its prices, it would be very risky for other interexchange carriers to make the investment needed to accommodate large additional traffic volumes which might not materialize.[129] Sprint thus concludes that the fact that interexchange carriers other than AT&T may have fiber in the ground cannot be considered an absolute constraint on AT&T's pricing.[130] TRA asserts that, because AT&T, MCI and Sprint all benefit from price stability, none of the carriers would benefit from a price war.[131] TRA therefore argues that the excess capacity in the interexchange industry upon which AT&T places so much reliance in arguing that it lacks market power is essentially irrelevant because no carrier will undertake the actions necessary to exploit that excess capacity.[132]

52. The Joint Bell Companies maintain that almost all of the more than 500 long-distance carriers alluded to in AT&T's initial pleading are resellers; that few carriers other than AT&T, MCI, and Sprint have facilities-based networks covering significant geographic areas, and that by any measure (revenue, capital, and other standards), AT&T dwarfs these companies combined.[133] They further argue that continued entry by resellers is evidence that AT&T is holding prices sufficiently above the competitive level so as to make reseller entry profitable.[134] They assert that MCI and Sprint are "the only other players worth serious consideration."[135] They further assert that the existence of excess capacity does not mean that AT&T is not the dominant firm, that AT&T's market power is constrained, or that AT&T's ability to charge excessive rates is inhibited.[136] The Joint Bell Companies argue that the continued presence of, in their view, only three national, facilities-based interexchange carriers more than a decade after divestiture, proves that there are significant barriers to

[128] Sprint November 12, 1993 Comments at 11-12.

[129] Id.

[130] Id.

[131] TRA June 9, 1995 Comments at 14.

[132] Id. at 15.

[133] Joint Bell Companies November 12, 1993 Comments at 5.

[134] Joint Bell Companies June 9, 1995 Comments, Attachment E, William E. Taylor and J. Douglas Zona, "Analysis of the State of Competition in Long Distance Telephone Markets" at 38-41.

[135] Joint Bell Companies November 12, 1993 Comments at 6.

[136] Id. at 6-7.

market entry.[137] They maintain that excess capacity does nothing to upset this oligopolistic market structure, and that such excess capacity, as well as other network economics, are actually obstacles to competition, rather than assurances of it.[138]

(c) Demand Elasticity

53. AT&T maintains that a high own-price elasticity of demand for long-distance services prevents AT&T from possessing or exercising market power.[139] AT&T argues that churn data are a key indicator of the demand responsiveness of the market and the inability of any single carrier to exercise market power.[140] According to AT&T, consumers changed carriers 18 million times in 1993 and 27 million times in 1994.[141] AT&T estimates that, of the 27 million changes in 1994, over 19 million were by customers who made only one change during the year.[142] Thus, according to AT&T, about one in five residential customers changed carriers at least once last year.[143] Finally, AT&T states that for 1995, consumer churn is running at an annual rate of 30 million carrier changes.[144]

54. IDCMA contends that AT&T's churn argument is misleading with respect to business customers.[145] IDCMA points out that the churn rate for business services is substantially less than residential churn because switching carriers in the business sector is

[137] Joint Bell Companies June 9, 1995 Comments at 2-4.

[138] Id. at 4-5; see also Ad Hoc IXCs November 12, 1993 Comments at 26; WilTel December 3, 1993 Reply Comments at 3, 11. Ad Hoc IXCs and WilTel contend that it is inappropriate to use the excess capacity of interexchange carrier transmission facilities as a measure of competition in the market.

[139] The own-price elasticity of demand measures the responsiveness in the demand for AT&T's services to changes in AT&T's prices, given that competitors' prices are held constant. See, e.g., James W. Henderson & Richard E. Quandt, Microeconomic Theory: A Mathematical Approach (3rd ed. 1980).

[140] AT&T April 24, 1995 Ex Parte Filing at 33.

[141] Id.

[142] Id. at 33-34.

[143] Id. at 34.

[144] Id.

[145] IDCMA June 9, 1995 Comments at 8.

far more difficult and costly than switching carriers for residential services.[146] IDCMA adds that most business customers obtain long-term service contracts that may include severe early termination penalties.[147] TRA argues that many resellers have entered into long-term contracts with AT&T because of a perceived necessity, deriving from business customer demands for an "AT&T product," owing to AT&T's dominance in the market, rather than its ability to offer more competitive terms and conditions than its competitors.[148] Sprint argues that the number of consumers who believe that AT&T is the best in terms of overall satisfaction suggests that those customers do not perceive the services of competitors to be equivalent substitutes to AT&T's services.[149] The Joint Bell Companies assert that neither churn among residential customers, nor the advertising campaigns that prompt it, prove that the interexchange market is competitive.[150] The Joint Bell Companies argue that firms not competing on price often shift their efforts to attracting customers through advertising, because increasing price/cost margins makes gaining a new customer relatively profitable.[151] They further argue that advertising may make the market less competitive by differentiating products.[152]

(d) AT&T's Cost Structure, Size, and Resources

55. Several commenters argue that AT&T is dominant simply by virtue of its lower costs, sheer size, superior resources, financial strength, and technical capabilities.[153] A number of commenters argue that AT&T's size and usage requirements permit it to enjoy a substantial competitive advantage over its rivals in the form of volume and term discounts

[146] Id. at 9.

[147] Id.

[148] Ex Parte Presentation of Telecommunications Resellers Association in Opposition to AT&T's Motion for Reclassification as a Non-Dominant Carrier, CC Docket No. 79-252, filed August 28, 1995 at 26.

[149] Sprint November 12, 1993 Comments at 9.

[150] Joint Bell Companies June 9, 1995 Comments at 12.

[151] Id.

[152] Id., Attachment E, William E. Taylor and J. Douglas Zona, "Analysis of the State of Competition in Long-Distance Telephone Markets," at 37-38.

[153] Sprint November 12, 1993 Comments at 9; IDCMA November 12, 1993 Comments at 8-9; Alascom November 12, 1993 Comments at 5; Joint Bell Companies November 12, 1993 Comments at 5; SP November 12, 1993 Comments at 2; ANI November 12, 1993 Comments at 27-28.

with local exchange carriers (LECs) and competitive access providers (CAPs).[154] They further argue that because most non-dominant carriers do not have the traffic volumes to support dedicated transport facilities -- and thus must buy more of the higher-priced switched transport services -- AT&T, in the absence of dominant carrier regulation, could use this cost advantage to adopt anticompetitive pricing strategies.[155] LDDS argues that, due to AT&T's existing collocation agreements with LECs, AT&T has enjoyed reduced mileage charges for special access facilities between the LECs' serving wire centers and its points of presence.[156] WilTel argues that, because AT&T purchases over half of all interstate access, it retains unparalleled power to extract discriminatory price concessions from access providers.[157] WilTel concludes that AT&T has "effective economic control" of local bottleneck facilities and that this is evidence of AT&T's dominant position in the marketplace.[158] Consequently, WilTel argues that interexchange carriers who lack the same market power will be at a competitive disadvantage relative to AT&T if AT&T is reclassified as non-dominant.[159]

56. AT&T responds that its alleged access cost advantages provide no basis for denying AT&T's motion. AT&T asserts that the Commission considered and rejected these claims in the First Interexchange Competition Order.[160] AT&T also argues that the recent changes to the local transport rules were exceedingly modest and will only allow AT&T to participate in the substantial savings that would have been available to it under cost-based

[154] Comptel June 9, 1995 Comments at 17-19; TRA June 9, 1995 Comments at 10; LDDS November 12, 1993 Comments at 1-3; Sprint November 12, 1993 Comments at 13-16; MCI November 12, 1993 Comments at 17-18; WilTel November 12, 1993 Comments at 4-5; CompTel November 12, 1993 Comments at 11; ACTA November 12, 1993 Comments at 9; Joint Bell Companies November 12, 1993 Comments at 8-10; Ad Hoc IXCs November 12, 1993 Comments at 26-27.

[155] See LDDS November 12, 1993 Comments at 1-3; Sprint November 12, 1993 Comments at 13-16; WilTel November 12, 1993 Comments at 5; ACTA November 12, 1993 Comments at 9; TRA June 9, 1995 Comments at 10; CompTel June 9, 1995 Comments at 17-19.

[156] LDDS November 12, 1993 Comments at 2-3.

[157] WilTel November 12, 1993 Comments at 4; see also WilTel December 3, 1993 Reply Comments at 3-4.

[158] WilTel November 12, 1993 Comments at 7.

[159] Id. at 5.

[160] AT&T December 3, 1993 Reply Comments at 18 n.33 (citing First Interexchange Competition Order, 6 FCC Rcd at 5890).

pricing.[161] AT&T further contends that its evidence and methodologies concerning prices, costs, price/cost margins and other pricing trends, are accurate and appropriate, and that AT&T has in fact passed through to consumers reductions in LEC access charges.[162]

(2) Discussion

(a) Supply Elasticity

57. It is well-established that supply and demand elasticities are properly considered in assessing whether a firm has market power in the relevant product and geographic markets.[163] The Commission explained in the First Interexchange Competition Order that there are two factors that determine supply elasticities in the market. The first is the supply capacity of existing competitors: supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period. The second factor is low entry barriers: supply elasticities tend to be high even if existing suppliers lack excess capacity if new suppliers can enter the market relatively easily and add to existing capacity.[164]

58. We find that, in the interstate, domestic, interexchange market, supply is sufficiently elastic to constrain AT&T's unilateral pricing decisions. In making this determination, we find that "AT&T's competitors have enough readily available excess capacity to constrain AT&T's pricing behavior -- i.e., that they have or could quickly acquire the capacity to take away enough business from AT&T to make unilateral price increases by AT&T unprofitable."[165]

59. AT&T asserts, and no one disputes, that MCI and Sprint alone can absorb overnight as much as fifteen percent of AT&T's total 1993 switched demand at no incremental capacity cost; that within 90 days MCI, Sprint, and LDDS/WilTel, using their existing equipment, could absorb almost one-third of AT&T's total switched capacity; or that within twelve months, AT&T's largest competitors could absorb almost two thirds of

[161] Id. at 18-19.

[162] AT&T June 30, 1995 Reply Comments at 27-32.

[163] See William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 945-52 (1981); E. Thomas Sullivan and Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications 222-24 (1988).

[164] First Interexchange Competition Order, 6 FCC Rcd at 5888.

[165] See id.

AT&T's total switched traffic for a combined investment of $660 million.[166] Thus, AT&T's competitors possess the ability to accommodate a substantial number of new customers on their networks with little or no investment immediately, and relatively modest investment in the short term. We therefore conclude that AT&T's competitors have sufficient excess capacity available to constrain AT&T's pricing behavior.

60. Sprint's argument that AT&T's competitors would not make the necessary investment to accommodate large additional traffic, resulting from a price increase by AT&T, because AT&T could immediately decrease its prices, is inapposite. Sprint assumes that a one-time massive capital investment would be necessary for AT&T's competitors to begin adding customers. The issue, however, is not whether Sprint and MCI could and should expand their networks so they can serve all of AT&T's customers within a short time frame. Rather, the issue is whether, in the short term, Sprint and MCI have sufficient available excess capacity to add a significant number of new customers.[167] The evidence shows that Sprint and MCI can add significant numbers of new customers with their existing capacity and add incrementally to this capacity as new customers are added to their networks.

61. In general, entry into the interstate long-distance market is not prohibited by regulation.[168] Although facilities-based entry into long-distance requires a substantial initial network investment,[169] resellers have avoided these sunk costs by leasing the excess capacity of existing facilities-based carriers.[170] In addition, some resellers grow to become regional or even national facilities-based competitors (such as ALC/Allnet and WorldCom, formerly LDDS/WilTel).[171] Such entry can put downward pressure on price if AT&T attempts to charge a supra-competitive price.[172]

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[166] See AT&T April 24, 1995 Ex Parte Filing at 16.

[167] See First Interexchange Competition Order, 6 FCC Rcd at 5888.

[168] AT&T April 24, 1995 Ex Parte Filing, Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig, at 134. We note, however, that there are restrictions, under Section 310 of the Act, on entry by foreign companies, and domestic companies with certain percentages of foreign ownership. The Regional Bell Operating Companies (RBOCs) are similarly prohibited from entering the interstate long-distance market by judicial decree under the MFJ.

[169] Id. at 131.

[170] Id. at 132.

[171] Id.

[172] Finally, we note that reseller entry does not necessarily imply that AT&T is holding (continued...)

62. We find unpersuasive the arguments that interexchange carriers other than AT&T, MCI, and Sprint are too small to exert competitive pressure. In 1994 those other carriers accounted for 17.3 percent of interstate interexchange revenues, which is approximately equal to MCI's revenues.[173] In addition, the commenters fail to provide any evidence about the relative size of each of these other carriers. Finally, the commenters fail to provide any evidence that these companies could not expand to serve additional AT&T customers should AT&T attempt to charge a supra-competitive price. In fact, these carriers have increased their share from 11.8 percent in 1991 to 17.3 percent in 1994, thus demonstrating their ability to attract and serve new customers.[174]

(b) *Demand Elasticity*

63. The record in this proceeding indicates that residential customers are highly demand-elastic and will switch to or from AT&T in order to obtain price reductions and desired features.[175] AT&T's studies show that as many as twenty percent of its residential customers, representing nineteen percent of annual revenue to AT&T, change interexchange carriers at least once a year.[176] This high churn rate among residential consumers -- approximately 30 million changes are expected in 1995 -- demonstrates that these customers find the services provided by AT&T and its competitors to be very close substitutes.[177]

64. The largest interexchange carriers continually promote various discount plans, which meet the needs of customers with different calling patterns (e.g., volume discounts, calling circles, postalized rates) and offer cash awards to entice residential consumers to switch carriers. These carriers have also spent significant resources to market and advertise their services and prices to residential customers. One study offered by AT&T indicates that

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[172](...continued)
prices above the competitive level, but rather could simply imply that there is a large enough difference between the price AT&T charges one group of customers and another to make reseller arbitrage profitable.

[173] Report, Long Distance Market Share, First Quarter 1995, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission at 12 (rel. July 21, 1995) (IAD 1995 Long Distance Market Share Report).

[174] Id.

[175] See AT&T April 24, 1995 Ex Parte Filing, Attachment O (Total Industry Churn Chart); First Interexchange Competition Order, 6 FCC Rcd at 5887-88.

[176] AT&T April 24,1995 Ex Parte Filing, Attachment G, Affidavit of B. Douglas Bernheim and Robert D. Willig at 141.

[177] AT&T April 24, 1995 Ex Parte Filing at 34.

AT&T's advertising increased 85 percent between 1989 and 1992 to $1.6 billion.[178] We believe that these facts, along with the high churn rate among consumers, suggest that AT&T lacks the ability to raise its price unilaterally above competitive levels in the provision of long-distance residential services. We reject the argument that high advertising expenditures by long-distance carriers indicate a lack of competition. The fact that AT&T and its competitors advertise their discount plans, and not their basic schedule rates, demonstrates that advertising is not inconsistent with aggressive price competition. Similarly, that competing carriers' products are slightly differentiated is also not inconsistent with substantial competition, since the carrier may be designing calling plans to target specific groups of consumers.

65. We also find, consistent with the First Interexchange Competition Order, that business customers are highly demand-elastic. In that order, the Commission discussed in detail the high demand elasticities of business telecommunications users. Specifically, the Commission found that business customers "routinely request proposals from carriers other than AT&T and accord full consideration to these proposals."[179] Furthermore, we found that business users consider the offerings of AT&T's competitors to be similar in quality to AT&T's offerings.[180] Purchasers of business services, the Commission found, were also more sophisticated and knowledgeable about the products they buy and often make decisions based on advice from consultants and in-house telecommunications experts about the service offerings and prices that are available to them.[181] While TRA argues that in the resale context certain business customers prefer only an "AT&T product," despite the ability of AT&T's competitors to offer more competitive terms and conditions, this does not mean that AT&T has the ability to control price. In addition, evidence in the record indicates that in 1994, AT&T supplied only 25.6 percent of the approximately $4.4 billion in services that were resold, and that by 1996, AT&T will supply only 20.3 percent of the approximately $5.6 billion services that are resold.[182] Consequently, TRA's summary assertion is not sufficient to cause us to depart from our findings in the First Interexchange Competition Order. Accordingly, we affirm our findings in the First Interexchange Competition Order that business customers are highly demand-elastic. The willingness of business and residential customers to switch long-distance providers is evidence of a lack of market power on the part of AT&T.

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[178] AT&T Motion, Appendix A, Michael E. Porter, "Competition in the Long Distance Telecommunications Market," at 6-7 (1993).

[179] First Interexchange Competition Order, 6 FCC Rcd at 5887.

[180] Id.

[181] Id. at 5887-88.

[182] Ex Parte Presentation in Support of AT&T's Motion for Reclassification as a Non-dominant Carrier, CC Docket No. 79-252, filed August 19, 1995, at 5.

66. In concluding that residential and business customers are demand elastic, we do not discount the significance of AT&T's goodwill or consider it to be of no marketing value to AT&T. As the Commission stated in the First Interexchange Competition Order, "[i]n any market in which relatively new entrants compete against one or more established incumbents, goodwill is bound to play a role, in some cases a prominent role."[183] That does not mean, however, that AT&T has market power or that residential and business customers are demand inelastic. Particularly where business customers tend to be sophisticated and residential customers show high churn rates, the significance in the marketplace of name recognition and historic goodwill is reduced.

(c) Market Share

67. AT&T's steadily declining market share for long-distance services also supports the conclusion that AT&T lacks market power in the relevant market. At the time of the Competitive Carrier First Report and Order, AT&T had approximately 90 percent of the overall long-distance industry revenues. From 1984 to 1994, AT&T's market share, in terms of both revenues and minutes, fell from approximately 90 percent to 55.2 and 58.6 percent in terms of revenues and minutes respectively.[184]

68. Although several parties argue that AT&T's overall market share of 60 percent is inconsistent with a finding that AT&T lacks market power, we disagree. It is well-established that market share, by itself, is not the sole determining factor of whether a firm possesses market power. Other factors, such as demand and supply elasticities, conditions of entry and other market conditions, must be examined to determine whether a particular firm exercises market power in the relevant market.[185] As we noted in the First Interexchange

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[183] First Interexchange Competition Order, 6 FCC Rcd at 5888.

[184] See Appendix B, Figure 1. See also IAD 1995 Long Distance Market Share Report at 13.

[185] See United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974) (market share is imperfect measure because market must be examined in light of access to alternative supplies); United States v. Baker Hughes, Inc., 908 F.2d 981, 986 (D.C. Cir. 1990) (market share statistics "misleading" in a "volatile and shifting" market); United States v. Syufy Enterprises, 903 F.2d 659, 664-67 (9th Cir. 1990); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335-36 (7th Cir. 1986); Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221, 87-8, Further Notice of Proposed Rulemaking, 10 FCC Rcd 3524, 3535 (1995). See generally Phillip E. Areeda, Herbert Hovenkamp, & John L. Solow, IIA Antitrust Law: An Analysis of Antitrust Principles and Their Application 83-302 (1995) (discussing various factors considered in assessing market power).

Competition Order, "[m]arket share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities."[186]

69. Our determination fifteen years ago in the First Report and Order that AT&T possessed market power rested on several market characteristics, including the facts that AT&T controlled, through its ownership of the Bell Operating Companies, local access facilities for over 80 percent of the nation's phones, and that AT&T was virtually the only supplier of all interexchange services. While divestiture removed AT&T's control over local bottleneck facilities, the interstate, interexchange market was still in its infancy and therefore did not support a finding of non-dominance for AT&T.

70. Today, conditions in the market are far different. First, AT&T has not controlled local bottleneck facilities for over ten years. Second, AT&T faces at least two full-fledged facilities-based competitors. Both MCI and Sprint have nationwide networks that are capable of offering most consumers an alternative choice of services relative to AT&T. In addition, there is at least one other nationwide facilities-based provider (WorldCom, formerly LDDS/WilTel), which primarily serves the business market and could enter the residential market segment, and dozens of regional facilities-based carriers. There are also several hundred small carriers that primarily resell the capacity of the largest interexchange carriers. We believe that the significant excess capacity and large number of long-distance carriers limits any exercise of market power by AT&T.

71. Third, virtually all customers today, including resellers, have numerous choices of equal access carriers employing facilities or resale, or both. Equal access was mainly implemented by the local exchange carriers between 1984 and 1989. In 1984, equal access was not available. Major competitors such as MCI and Sprint did not have equal access in a majority of central offices until 1989. By 1994, equal access was available in 97 percent of the central offices, and was available to all long-distance carriers. Taken together, these changes in market conditions warrant our reconsideration and reevaluation of AT&T's classification.

72. The behavior of the market between 1984 and 1994 suggests intense rivalry among AT&T, MCI and Sprint. Moreover, we note that AT&T's market share fell approximately 33 percent between 1984 and 1994. The fact that the rate of decline of AT&T's market share has decreased during the last five years is not an indication of market power. Rather, it may simply reflect the fact that, since 1990, most customers, including resellers, have had dozens of choices of equal access carriers, and that AT&T's competitors no longer have the advantage of lower access costs that enabled them to underprice AT&T and capture market share. Accordingly, we find the decline in AT&T's market share suggests that AT&T no longer possesses market power.

[186] First Interexchange Competition Order, 6 FCC Rcd at 5890.

(d) AT&T's Cost Structure, Size, and Resources

73. Several parties claim that AT&T retains market power simply by virtue of its lower costs, sheer size, superior resources, financial strength, and technical capabilities. We do not find that these advantages, by themselves, confer market power on AT&T. As we observed in the Interexchange Competition proceeding, the issue is not whether AT&T has advantages, but "whether any such advantages are so great to preclude the effective functioning of a competitive market."[187] It is not surprising that an incumbent would enjoy certain advantages, including resource advantages, scale economies, long-term relationships with suppliers (including collocation agreements), and ready access to capital. Such advantages, however, do not a fortiori indicate that AT&T has a lower cost structure that can give it an unfair competitive advantage over its competitors. As we discussed in the First Interexchange Competition Order, in comparing cost structures of competing carriers, it is not enough simply to look at access or transport costs. The fact that "AT&T may pay lower transport charges than a competitor in a particular LATA . . . does not mean that its overall transport cost structure is lower than those of its competitors."[188] Moreover, such advantages, if they do exist, do not indicate that AT&T has the ability to control price. Volume and term discounts, for example, are expressly permitted by the Commission so that firms can take advantage of their size. That AT&T is in a position to obtain volume and term discounts from CAPs and LECs does not necessarily confer market power on AT&T. Indeed, there is no evidence that the advantages enjoyed by AT&T with regard to volume and term discounts give AT&T the power to sustain prices profitably above the competitive level. As we noted in the First Interexchange Competition Order, the "competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for this process to work."[189] Nothing in the record in this proceeding demonstrates otherwise. Accordingly, we do not find that AT&T's size or cost structure constitutes persuasive evidence of market power.

b. Specific AT&T Service Groupings

74. As we have stated above, AT&T's ability to control the price of individual services within the overall relevant market is not the determining factor in assessing AT&T's dominance in the interstate, domestic, interexchange market. Nonetheless, a number of parties on the record have raised arguments regarding AT&T's alleged market power with respect to specific services. Accordingly, we now examine AT&T's provision of a number of individual services, to assess their effect on AT&T's overall market power.

[187] First Interexchange Competition Order, 6 FCC Rcd at 5891-92.

[188] Id. at 5890.

[189] Id. at 5892.